Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,

Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four].

JURISDICTIONAL STATEMENT.

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BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four].

JURISDICTIONAL STATEMENT.

This is an appeal brought by Popular Science Publishing Company, Inc. from the decision of the Court of Appeal of the State of California upholding the imposition by the Board of Equalization of the State of California of use tax collection liability on Appellant's mail order sales to California residents. Appellant's petition for a hearing was denied by the California Supreme Court. The Court of Appeal held that *National Geographic v. State Board of Equalization,* 16 Cal. 3d 643, 128 Cal. Rptr. 682 (1976), which is currently on appeal to the Supreme Court of the United States, was dispositive of the issues in this case. This Court has noted probable jurisdiction of the appeal from

the decision of the California Supreme Court in *National Geographic*, 45 U.S.L.W. 3280 (1976).

The Supreme Court of California in that case adopted a test of use tax liability based on the "slightest presence within such taxing state" regardless of the nature of such presence. This test, which was applied by the Court of Appeal in the instant case, is directly contrary to the holdings of this court in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) and *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

Inasmuch as this case presents substantially similar issues to *National Geographic* within the context of facts far less favorable to the Appellee Board, substantial justice requires that the opinion of the Court of Appeal of California, Second Appellate District, be set aside, and the order of the Superior Court of Los Angeles County holding in favor of Appellant on December 30, 1974, be reinstated.

Opinions Below.

The unreported opinion of the Court of Appeal of the State of California, Second Appellate District (Division Four) is set forth in Appendix A hereto. The order of the Supreme Court of California denying Appellant's petition for a hearing is reprinted in Appendix B.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). This appeal tests the validity of compelling the Popular Science Publishing Company, Inc.[1] (hereinafter "Appellant") to pay state use tax

[1]The Company's name was changed to Times Mirror Magazines, Inc. subsequent to the filing of this action.

under California Revenue and Taxation Code §§6006 (g), 6201-6204 (printed in Appendix C) on its mail order sales to California residents effected entirely through interstate commerce and having no contact with the taxing state except through the instrumentalities of interstate commerce. The imposition of such use tax liability contravenes the Commerce Clause (Article I, Section 8(3)) and the Due Process Clause of the Constitution of the United States.

The instant case originated in 1970, when the Board of Equalization of the State of California (hereinafter "Board") mailed to Appellant a Notice of Determination of Liability under the California Revenue and Taxation Code for sales and use tax, interest and penalties allegedly due on mail order sales of books by Appellant during 1965 to its book club members in California. On October 18, 1971, Appellant paid under protest the assessed amount of $25,875.28 and subsequently filed its claim for refund with the Board on November 5, 1971. Appellant's claim for refund was deemed denied by the operation of California Revenue and Taxation Code §6934[2] when more than six months elapsed after the filing of the claim without the mailing of notice of action thereon to the Appellant.

On May 24, 1972, Appellant filed this action in Los Angeles County Superior Court, seeking a refund

[2]Section 6934 of the Revenue and Taxation Code reads as follows:

"6934. *Right of action on failure of board to mail notice.* If the board fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice by the board of its action on the claim, consider the claim disallowed and bring an action against the board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

on grounds that the imposition of use tax liability was a violation of the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States. After a non-jury trial upon a statement of stipulated facts, the Superior Court entered judgment in favor of Appellant and ordered the Board to refund $31,053.60, a sum which included interest and court costs.

On appeal, the Court of Appeal, Second Appellate District (Division Four) reversed on August 16, 1976, relying on *National Geographic v. State Board of Equalization, supra.* The Supreme Court of California denied a hearing on October 14, 1976. Timely notice of appeal to this Court was filed in the Court of Appeal on January 10, 1977. The notice of appeal is set forth as Appendix D.

As the Court of Appeal rejected the foregoing constitutional challenges to imposition of use tax liability under California Revenue and Taxation Code §6006(g) and Appellant's petition for hearing was denied by the Supreme Court of California, this case is appropriately brought before this Court by appeal. See, *e.g., Douglas v. California,* 372 U.S. 353, 354 (1963).

If, despite its action in *National Geographic,* this Court does not consider appeal the proper mode of review, the Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§1257(3) and 2103.

Questions Presented.

Whether the imposition of use tax collection liability upon an out-of-state mail order seller violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause where the seller's activities within the taxing state are insubstantial and utterly unrelated to the sales in interstate commerce sought to be taxed.

(a) Whether the presence within the taxing state of two salesmen, whose activities on behalf of a separate division of the out-of-state seller were entirely unrelated to the transactions sought to be taxed, provides the nexus required to impose use tax liability on the seller for such unrelated transactions conducted exclusively through the instrumentalities of interstate commerce.

(b) Whether the "slightest presence" test formulated by the California Supreme Court is constitutional as applied by the Court of Appeal of California in light of *Miller Bros. v. Maryland,* 347 U.S. 340 (1954) and other holdings of this Court consistent with the rationale of that decision.

Statement.

The Appellant seeks review of a holding of the Court of Appeal of California in favor of the Board in an action brought by Appellant to recover alleged use tax collection liabilities paid by Appellant to the Board under protest and for a declaration of nonliability for such use tax during the year in question.

Statement of Facts.

Appellant, Popular Science Publishing Company, Inc., was in 1965 and still is, a New York corporation maintaining its principal place of business in New York. During 1965[3] Appellant was principally engaged in publishing the monthly magazines "Popular Science" and "Outdoor Life." Appellant also sponsored the Popular Science Book Club and the Outdoor Life Book Club which periodically offered members a choice of books dealing generally with subjects similar to those treated in the two magazines (Stipulation of Facts ¶3, CT 17).[4]

In addition, during 1965 Appellant's A-V Division ("A-V") produced and sold instructional filmstrips and other audio-visual educational aids which dealt with subjects appropriate to secondary school curricula ("instructional materials"). These instructional materials were marketed exclusively through A-V. On January 1, 1966, A-V became a separate corporation (Stipulation of Facts ¶4, CT 17). During 1965 A-V employed two salesmen in California whose duties and activities were strictly confined to soliciting orders for A-V instructional materials. These instructional materials were sold primarily to secondary schools on the basis of orders received at Appellant's New York office and filled from inventories located outside of California.

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[3]The only year in dispute in this case is the tax year 1965. Unless otherwise indicated expressly, all references shall be to events and circumstances during that taxable year.

[4]The stipulation of facts is attached as Appendix E and is contained in the Clerk's Transcript on Appeal to be lodged with this Court. References to "CT" indicate the page number of the Clerk's Transcript where the referenced matter may be found.

A-V's customers had no relationship of any kind with either of Appellant's book clubs, although some may have been subscribers to either or both of Appellant's magazines. Such a connection, if it existed at all, would have been purely coincidental and had nothing to do with the activities of the A-V salesmen or the sales of instructional materials. The A-V salesmen did not promote or make any customer contacts on behalf of the magazines or either book club, were in no way involved in processing orders of, or collecting monies from, the magazine subscribers or book club members and had no operational connection of any kind in any way related to Appellant's magazines or book clubs. Their activity related exclusively to the sale of A-V instructional materials (Stipulation of Facts ¶5, CT 18).

Subscriptions to Appellant's magazines were generated through the subscriber's own initiative or as a result of mail or media advertising emanating from Appellant's New York office. All magazine subscription orders were received through the mail, accepted by Appellant in New York and filled by mail from Appellant's printers located outside of the State of California. Newsstand sales of the magazines were made by independent retail vendors supplied by a New York distributor which purchased the magazines from Appellant at wholesale (Stipulation of Facts ¶¶6-7, CT 18, 19).

Book club memberships were solicited by Appellant "exclusively through the mail from New York, and book sales were made on the basis of orders sent by mail to [Appellant] in New York in response to periodic mailings of brochures to members describing the current selections available." (Stipulation of Facts

¶6, CT 18). Book club orders were received through the mail, accepted by Appellant at its New York office, and filled by mailing the book club selection to the member from locations outside of the State of California (Stipulation of Facts ¶¶6-7, CT 18, 19).

As noted above, the Board assessed use taxes against Appellant under Revenue and Taxation Code Section 6006(g) on Appellant's mail order sales of books during 1965 to book clubs members using California addresses. On October 18, 1971, Appellant paid under protest $25,875.28, the total amount required by the determination of the Board.

How the Federal Questions Were Raised and Decided Below.

Appellant's Claim for Refund filed on November 5, 1971, was based on grounds that the imposition of use tax liability on Appellant violated the Due Process Clause of the Fourteenth Amendment, and by implication, the Commerce Clause of the United States Constitution. The Claim for Refund was deemed denied by operation of law, as referred to above, and on May 24, 1972, Appellant filed this action in Los Angeles County Superior Court.

In its suit in the Superior Court of California, the Appellant argued that: (1) the imposition of use tax on its mail order business violated due process of law since there was no meaningful relationship between Appellant's activities in California and the out-of-state mail order sales sought to be taxed and (2) the Board's decision to impose a use tax on Appellant's mail order book sales similarly violated the Commerce Clause.

The Superior Court entered judgment for Appellant, and in its minute order dated December 30, 1974, held the opinion in *Montgomery Ward & Co. v. State Board of Equalization,* 272 Cal. App. 2d 728 (1969), cert. den. 396 U.S. 1040 (1970), to be dispositive of the case (CT 66).

Finding that the Board's position was even stronger in *Montgomery Ward,* where the California Court of Appeal struck down the imposition of use tax on certain out-of-state sales by Montgomery Ward despite the retailer's substantial presence in California, the court quoted from that decision as follows:

> " 'the corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "disassociated from the local business" and therefore may not, consistent with due process, be taxed.' " (272 Cal. App. 2d at 755).
>
> " 'So here the fact that the retailer elected to carry on an intrastate business in California is purely fortuitous and does not give this state the right to reach out and tax or otherwise burden transactions which are entirely disassociated from local business.' " (272 Cal. App. 2d at 755).

Based on the Stipulation of Facts, the Court concluded that sales by Appellant's A-V Division were "entirely disassociated" from the book sales and ordered judgment for Appellant (CT 66).

On appeal by the Board to the Court of Appeal, that Court held that Appellant's constitutional challenges were foreclosed by the California Supreme Court's decision in *National Geographic Society v. State*

Board of Equalization, 16 Cal. 3d 637 (1976), despite the fact that the record showed no connection between the instate activities of the A-V salesmen and Appellant's mail order sales. The court noted that *Montgomery Ward* and *National Bellas Hess v. Department of Revenue,* 386 U.S. 753 (1967) were distinguished in *National Geographic* (Appendix A at 3-4a). In its decision, the Court particularly relied on the following passage from the *National Geographic* decision at 16 Cal. 3d 645:

> " 'Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the instate activities of such seller are "dissociated" from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale and holding of *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359.' "

Following the decision by the Court of Appeal, the Supreme Court of California denied Appellant's petition for a hearing in an order filed October 14, 1976. This appeal ensued.

The Questions Are Substantial.

As applied by the California Court of Appeal, the construction of the Revenue and Taxation Code by the Supreme Court of California allows the State of California to impose use tax collection liability on an out-of-state mail-order retailer's sales where the retailer's instate activities are minuscule and totally unrelated to the transactions sought to be taxed. This holding by the Court of Appeal extends the *National Geographic* decision by upholding the imposition of a use tax on out-of-state sales where there was *neither* substantial instate activity nor any connection between minimal instate activity and the activity being taxed. In so holding, the Court of Appeal's decision exceeds the limits drawn by this Court within which a state may constitutionally impose liability on out-of-state retailers for use tax on mail order sales. Thus, the Court of Appeal's dilution of the "nexus" requirement set forth by this Court ("some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax", *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 345) raises important questions about the limitations on a state's power to tax under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution.

The Imposition of Use Tax Collection Liability on a Foreign Corporation Is Constitutionally Impermissible Where There Is No Connection Between the Activities of Said Corporation Within the State and Its Interstate Mail Order Activities Sought to Be Taxed.

In *National Bellas Hess v. Dept. of Revenue,* 386 U.S. 753 (1967), this Court summarized the twin tests for imposition of use tax liability under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution as follows:

> "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. (citation omitted). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' (citations omitted). And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the State has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (additional citations omitted). The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. v. Maryland,* 347 U.S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744 (additional citations omitted)."

In every case in which this Court has upheld a state's power to impose liability on an out-of-state retailer for use tax on sales made to customers within the state, there has been a "definite link" (*Miller Bros. Co., supra*) between the instate activities of the retailer and the interstate transactions which were the target of the tax. Without that link, this Court has held that the state lacks the nexus necessary for the exercise of its taxing power. Such a nexus has been found to warrant imposition of use tax collection liability on an out-of-state seller where the seller's intrastate activities were inextricably intertwined with the transactions on which the tax was imposed. Thus in *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960), the presence of instate traveling salesmen soliciting orders for the products on which the obligation to collect use tax was claimed to have arisen was held to provide sufficient nexus.

This common factual pattern also unites *Felt & Tarrant Co. v. Gallagher,* 306 U.S. 62 (1939) (the retailer had two general agents in the taxing state, in offices for which the corporation paid the rent, soliciting orders for the items sought to be taxed); *McGoldrick v. Berwind-White Co.,* 309 U.S. 33 (1940) (the corporation maintained its sales office and sold and delivered the merchandise for which orders were solicited within the jurisdiction of the taxing authority); and *The Reader's Digest Association, Inc. v. Mahin,*

44 Ill. 2d 354 (1970), cert. den., 399 U.S. 919 (1970) (Reader's Digest advertised extensively in Illinois, placing advertisements for the products sought to be taxed in local newspapers and on local television and radio stations. In addition, advertising for the magazine was solicited by an Illinois subsidiary, which had made door-to-door sales of the very items the sales of which were sought to be taxed).

Similarly, in *Standard Steel Co. v. Wash. Revenue Dept.*, 419 U.S. 560 (1974)—a case which involved a business and occupation tax—the state was found to have established a taxable nexus where the out-of-state seller retained in the state a full-time engineer who advised the seller's purchaser of its needs for the very products ordered by mail and shipped in interstate commerce.

While this Court has rejected constitutional challenges based solely on claims that a seller's instate activities were technically divorced from its mail order business (see *e.g., Nelson v. Sears, Roebuck and Co.*, 312 U.S. 359 (1941)), such cases are clearly distinguishable from the case at bar.

In *Nelson v. Sears, Roebuck and Co.*, for example, the seller engaged in substantial related intrastate retail sales activities. The instate activities which supplied the nexus for the use tax were virtually identical to the interstate activities which Iowa sought to tax. Sears sold the same products to its mail order customers as it sold to Iowa customers at its Iowa retail outlets. Furthermore, the finding of a sufficient nexus rested in part on the fact that Sears was qualified to do business within the taxing state.[5]

[5]Even in *National Geographic Society, supra,* currently on appeal to this Court, the Supreme Court of California premised its holding on the similarity between the Society's instate activities and its mail order sales:

> "We observe no basic dissimilarity between the Magazine on the one hand and the maps, atlases, globes and books on the other. Both the Magazine and the latter mail order merchandise are ordered, paid for and delivered in essentially the same way. The Magazine and the merchandise are remarkably similar in nature, function and purpose. We can discern no significant difference between a periodical which deals with geography and maps, atlases, globes and books which obviously cover the same field of knowledge. Nor can we detect any fundamental difference in function—both the Magazine and the merchandise make information gathered by the Society available to its members." 16 Cal. 3d at 647.

The facts of this case are in sharp contrast to the decisions of this Court upholding use tax liability. As stipulated by the parties, there was no relationship between Appellant's mail order sales of books and the activities of the A-V salesmen within the state. Furthermore, Appellant was not qualified to do business in California and there is nothing in the record to support a claim that it was required to be so qualified.

A. The Presence Within the Taxing State of Two Salesmen Whose Activities Were Entirely Unrelated to the Mail Order Transactions Sought to Be Taxed Does Not Provide a Sufficient Nexus to Impose Use Tax Liability.

The central issue here is whether the presence in the State of California in 1965 of two isolated salesmen can constitutionally provide the necessary nexus within the state to make Appellant liable for a tax on unrelated mail order transactions conducted entirely through the instrumentalities of interstate commerce.

The Court of Appeal concluded, on the basis of two salesmen employed by Appellant's A-V Division who solicited sales of unrelated audio-visual products within California, that Appellant was liable for collec-

tion of use taxes on its mail order book sales[6] (Appendix A, 3a).

It is submitted, however, that the mere fact that Appellant had two salesmen within the state did not give California the constitutionally required nexus for imposition of use tax liability. There must be "some definite link" between the instate activities of these salesmen and Appellant's sales from without the state to California addresses to provide a nexus.[7] Moreover, this Court has stated that, with respect to a sales-related tax, an out-of-state vendor may be exempted from tax by a clear showing that there are no instate activities connected with the out-of-state sales. *American Oil v. Neill,* 380 U.S. 451, 458 (1965).

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[6]To the extent that the Court of Appeal's decision rested on a characterization of Appellant's two A-V salesmen as "an office," it is erroneous. The record does not show that A-V maintained an office within California.

[7]The scholarly opinion in *Montgomery Ward & Co., Inc. v. State Board of Equalization,* 272 Cal. App. 2d 723, 78 Cal. Rptr. 373 (1969), cert. den. 396 U.S. 1040 (1970) clarifies the qualitative test of whether there is a nexus sufficient for imposition of use tax liability. In that case, the Court struck down the imposition of California use tax on certain out-of-state sales by Montgomery Ward to California residents, even though Montgomery Ward's regional headquarters were located in California and the retailer maintained 21 retail stores within the state. The Court stated that:

> "California may burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. The protection afforded and the benefits conferred must have some relationship to the transaction which the state seeks to burden." *Montgomery Ward, supra,* at 382.

As the Court pointed out, even Montgomery Ward's substantial instate presence was not enough absent that crucial connection:

> "The existence of regional headquarters in Oakland, with administrative jurisdiction over the border stores, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here." 78 Cal. Rptr. 373, 385.

Here, as stipulated by the Board, it is clear that Appellant had no activities in California connected with the mail order sales which the state seeks to tax.

Unlike the retailer in *Sears, Roebuck & Co., supra,* the Appellant was not registered to do business in California as a foreign corporation and was not required to do so. Furthermore, Appellant had no warehouse, no retail stores, no tangible property, no offices, no real property, and no other constitutionally meaningful connection with the state of California during the period in question. The record shows no intrastate advertising in local newspapers, no radio or television spot advertisements aimed at potential California mail order customers, and no indirect sales or solicitation activities in California to promote the mail order sales of either the magazines or the book clubs by the A-V salesmen or through subsidiary organizations, departments, agents or independent contractors.

In short, none of the contacts which this Court has required to justify the imposition of use tax liability may be found here.

Appellant has willingly paid all the taxes due on its instate activities. It has no quarrel with a doctrine which holds that a retailer who engages in substantial instate activities promoting the very products he sells via interstate commerce should not be able to evade tax on those sales through intracorporate structural manipulations.

But that is not the case here. Measured against this Court's test of "whether the State has given anything for which it can ask return" (*Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444) it is apparent that

Appellant's interstate activities did not enjoy any opportunities, benefits and protection for which the state can in return impose such a burden on its sales in interstate commerce.

This Court has already noted probable jurisdiction of a similar challenge to California's extension of use tax collection liability in *National Geographic v. State Board of Equalization*, 45 U.S.L.W. 3280 (October 12, 1976).

It is respectfully submitted that the Court of Appeal decision based on the foregoing facts places an even more unreasonable and unconscionable burden on retail sales made in interstate commerce. As noted above, the contacts which Appellant had with the State were even more tenuous than those present in *National Geographic*.

B. The "Slightest Presence" Test Formulated by the California Supreme Court Is Unconstitutional as Applied by the Court of Appeal of California.

This Court has specifically rejected the imposition of use tax liability based solely on an out-of-state seller's presence within the taxing state without regard to the nature and quality of that presence. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). See also *Montgomery Ward, supra*, and the cases cited above.

In *Miller Bros. Co.*, the sales sought to be taxed by Maryland were made to Maryland residents who purchased goods at the Miller Bros.' Delaware store. The retailer's advertising in Delaware media was known to reach Maryland residents and circulars were mailed to Maryland customers. Furthermore, some of the purchases were delivered to customers in Maryland by

a Miller Bros. delivery truck. Nevertheless, this Court found the retailer to have an insufficient connection with Maryland to uphold the imposition of use tax liability.

The "slightest presence" test of the Supreme Court of California as followed by the Court of Appeal, eliminates the requirement for such a careful examination of an out-of-state retailer's instate activities. Instead, it substitutes a de facto rule whereby any contact with the state, however inconsequential, would be sufficient to support imposition of the state's taxing power.

This California rule would permit a state to tax an out-of-state company's sales made entirely in interstate commerce based solely on the entry into the state of salesmen attempting to introduce a separate product line even if no sales were consummated as a result of their activity. The perpetuation of such a rule would create unreasonable and stifling burdens on interstate commerce.

Conclusion.

For the reasons set forth herein, Appellant respectfully urges that the Court note probable jurisdiction of the appeal applied for herein. In *National Geographic v. State Board of Equalization*, 45 U.S.L.W. 3280 (1976), this Court has noted probable jurisdiction in a case raising similar legal issues.

The Court may wish to review the issues posed by this case within the context of facts which Appellant contends exceed even the limits on use tax liability set by the Supreme Court of California in *National Geographic, supra*. Appellant respectfuliy submits that this Court has never permitted the imposition of use

tax liability on an out-of-state seller's mail order transactions where, as here, the seller's activities within the taxing state are so insubstantial and utterly unrelated to the sales sought to be taxed. In light of the fact that the Court has noted probable jurisdiction in *National Geographic,* it is urged that it is essential that the Court note probable jurisdiction in this case to avoid substantial injustice to Appellant. Should the Court decline jurisdiction of this appeal, Appellant would be left without recourse even in the event that this Court reversed the decision in *National Geographic.* Clearly, a reversal of *National Geographic* would be dispositive of this case.

It is respectfully submitted that a decision upholding *National Geographic* would not necessarily be dispositive of this case, for the reasons discussed above.

In furtherance of noting probable jurisdiction the Court may wish to join this case with *National Geographic* because of the similarity of issues. Such action would permit this Court to resolve the extent of state taxing power within the context of factual circumstances which provide an even more tenuous claim for the constitutionally required nexus than the contacts present in *National Geographic, supra.*

In the alternative, this Court may wish to hold this case pending a decision on the merits in *National Geographic.*

Appellant respectfully urges this Court to adopt one of the foregoing courses of action.

Respectfully submitted,

JAMES W. WALLACE,
HUGH S. MCMULLEN,
Attorneys for Appellant.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Popular Science Publishing Company, Inc., Plaintiff and Respondent, v. State Board of Equalization of the State of California, Defendant and Appellant. Civ. No. 46535, (Superior Court No. C 30578).

Filed: Aug. 16, 1976.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Reversed with directions.

Evelle J. Younger, Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Appellant.

James W. Wallace and Hugh S. McMullen for Plaintiff and Respondent.

Defendant board appeals from a judgment of the trial court for plaintiff. Plaintiff, Popular Science Publishing Company, Inc.[1] sued defendant board for refund of use tax, plus interest and plus penalty, paid under protest. The case was tried by the trial judge upon a stipulation of facts, upon the depositions of two of respondent's officers and upon a handbook of educational film strips.[2] The facts stipulated to show that, at all times pertinent, plaintiff was a New York corporation; in 1965, the year involved in the use tax payment, plaintiff published "Popular Science" and

---

[1]The name, "Popular Science Publishing Company, Inc.", was changed to "Times Mirror Magazines, Inc." after the filing of the action.

[2]The Stipulation of Facts is before us and provides that either party may offer additional evidence.

"Outdoor Life" and sold these magazines throughout the United States by mail and through news vendors; plaintiff also sponsored Popular Science Book Club and Outdoor Life Book Club; and its audio-visual division produced and sold instructional film strips; "A-V" was established in 1965 to market these strips and A-V became a separate corporation January 1, 1966; A-V employed two salesmen who lived in and traveled throughout California for the purpose of selling the audio-visual film strips to educational institutions; the A-V salesmen had no operational connection with plaintiff's magazines or book clubs; subscriptions to "Popular Science" and "Outdoor Life" were obtained as a result of mail or media advertising emanating from plaintiff's New York office; newsstand sales were made by independent retail vendors "supplied by a New York distributor which purchased the magazines from Plaintiff at wholesale"; book club memberships were solicited by mail sent from New York; plaintiff maintained no offices in California through which any aspect "of its magazine publishing or book club business was conducted, and Plaintiff had no employee or independent contractor in California" who promoted sales to California residents of "Popular Science" or "Outdoor Life" or offered memberships in either book club.

The question for us to determine is whether this stipulation of facts shows sufficient basis for sustaining the trial court's judgment. We conclude that it does not, for the reason that the use of a separate division in California to sell film strips does not insulate plaintiff from its duty to collect a sales/use tax in California on its mail order sales to California residents. The effect of the use taxation was to insure competitive parity between foreign and local retailers by requiring

the foreign retailers to collect a use tax which is identical in amount to the tax imposed upon local retailers. (*National Geographic Society v. State Bd. of Equalization,* 16 Cal.3d 637, 641 [1976]; *Montgomery Ward & Co. v. State Bd. of Equalization,* 272 Cal.App.2d 728, 739 [1969].)

Respondent magazine publisher argues that to impose a use tax on mail order sales would be contrary to the due process and commerce clauses of the United States Constitution (14th Amendment and art. I, § 8, clause 3) because no connection was shown between the instate activities of the A-V salesmen and the mail order sales. However, *National Geographic Society v. State Bd. of Equalization, supra,* 16 Cal.3d at pp. 640, 642, involving the use by National Geographic of two offices in California to solicit advertising for its magazine. Here, the office of respondent was disassociated from sales, except audio-visual products; respondent relies upon disassociation. Concerning this, our Supreme Court stated in *National Geographic Society v. State Bd. of Equalization, supra,* 16 Cal.3d at p. 645, the following: "Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the in-state activities of such seller are 'dissociated' from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale

and holding of *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359."

Respondent's and the trial court's reliance upon the cases of *Montgomery Ward & Co., supra,* 272 Cal. App. 2d and *Nat. Bellas Hess v. Dept. of Revenue,* 386 U.S. 753, 18 L.Ed.2d 505 (1967) is misplaced; both cases are distinguishable and are distinguished by our Supreme Court in *National Geographic Society, supra,* 16 Cal.3d.

The judgment is reversed with directions to the trial court to enter judgment for defendant.

NOT FOR PUBLICATION

Dunn, *J.*

We concur:

Kingsley, *Acting P. J.*

Jefferson (Bernard), *J.*

APPENDIX B.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 4, Civil No. 46535,

In the Supreme Court of the State of California in Bank.

Order Due October 15, 1976.

Popular Science Publishing Company, Incorporated v. State Board of Equalization, etc.

Filed: Oct. 14, 1976.

Appellant's petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is denied.

Wright
Chief Justice

APPENDIX C.

Constitutional and Statutory Provisions Involved.

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§6201-04, 6006(g), set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser

from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Sections 292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from

the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6006(g). Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in for-hire transportation of property in interstate or foreign commerce, such as railroad locomotives, trucks, truck tractors, truck trailers, dollies, bogies, chassis, and cargo shipping containers.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

APPENDIX D.

Notice of Appeal.

In the Court of Appeal of the State of California, Second Appellate District [Division Four].

Popular Science Publishing Company, Inc., Plaintiff and Appellant v. State Board of Equalization of the State of California, Defendant and Appellee. Civil No. 46535.

Filed: Jan. 10, 1977.

TO: THE CLERK OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT [DIVISION FOUR]:

NOTICE IS HEREBY GIVEN that Popular Science Publishing Company, Inc., Plaintiff and Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered on August 16, 1976, a hearing on which was denied by the Supreme Court of the State of California on October 14, 1976.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: January 10, 1977.

JAMES W. WALLACE
HUGH S. MCMULLEN
/s/ By James W. Wallace
James W. Wallace
Attorneys for
Plaintiff and Appellant

APPENDIX E.

Stipulation of Facts.

Superior Court of the State of California, for the County of Los Angeles.

Popular Science Publishing Company, Inc., plaintiff, vs. State Board of Equalization of the State of California, Defendant. No. C 30578.

FILED: August 27, 1974.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that, for the purpose of trial in the above-entitled cause, the facts hereinafter stated are undisputed and may be treated by the Court as facts proved in open court, and that the parties may, on the trial of said cause, call witnesses and offer evidence for the purpose of proving such additional facts as the parties may see fit;

In making the stipulation, the parties do not waive any legal objection to the relevancy, materiality, or the admissibility in evidence of any of the facts set forth in the stipulation, and each party reserves the right to offer any legal objection thereto, or to any paragraph, or any part hereof, either by filing written objections or by stating such objections orally in open court, at any time during the trial of said cause before the objecting party concludes his offer of evidence and rests his case. Any objection so made shall be considered timely;

1. On or about October 19, 1971 Popular Science Publishing Company, Inc. ("Plaintiff") paid to Defendant under protest the sum of twenty-five thousand

eight hundred seventy-five dollars and twenty-eight cents ($25,875.28), the amount of sales and use tax, interest and penalty allegedly due on sales of books by Plaintiff during 1965 to its book club members in California.

2. Plaintiff was in 1965 and still is a corporation organized under the laws of the State of New York and maintains its principal place of business in New York. During 1965 Plaintiff was engaged primarily in the business of publishing and distributing through the United States and foreign mails and through news vendors the monthly magazines "Popular Science" and "Outdoor Life."

3. Plaintiff also sponsored during 1965 the Popular Science Book Club and the Outdoor Life Book Club, the memberships of which to a significant extent were composed of readers of "Popular Science" and "Outdoor Life." The book clubs offered members, on a monthly basis, a choice of hard and soft cover books dealing generally with subjects similar to those treated in Plaintiff's two magazines.

4. In addition, during 1965 Plaintiff produced and sold instructional film strips and other audo-visual educational aids which dealt with subjects appropriate to secondary school curricula ("instructional materials") exclusively through A-V Division ("A-V"). A-V was set up in 1965 to market instructional materials. A-V became a separate corporation on January 1, 1966.

5. During 1965, A-V's instructional materials were sold to customers, primarily secondary schools, on the basis of orders received at Plaintiff's New York office and fulfilled from its inventories located outside the State of California. Commencing on April 16, 1975, A-V employed two salesmen in California whose duties

and activities were always confined to the sales of A-V instructional materials only. The A-V salesmen lived in and traveled throughout California contacting prospective customers which were in the main schools and other educational institutions. Such customers of A-V instructional materials had no relationships of any kind with either of Plaintiff's book clubs, although some may have been subscribers to either or both of Plaintiff's magazines. The A-V salesmen did not promote or make any customer contacts on behalf of the magazines or either book club, were in no way involved in processing orders of or collecting from the magazine subscribers or book club members, and had no operational connection of any kind which in any way related to the Plaintiff's magazines or book clubs. The A-V salesmen's employment related exclusively to the sale of A-V instructional materials.

6. California subscriptions to "Popular Science" and "Outdoor Life" were generated either through the subscriber's own initiative or as a result of mail or media advertising emanating from Plaintiff's New York office, while newsstand sales were made by independent retail vendors supplied by a New York distributor which purchased the magazines from Plaintiff at wholesale. Book club memberships were solicited exclusively through the mail from New York, and book sales were made on the basis of orders sent by mail to Plaintiff in New York in response to periodic mailings of brochures to members describing the current selections available.

7. All "Popular Science" and "Outdoor Life" subscription and book orders were received and accepted by mail at Plaintiff's New York office and filled by mail directly to the subscriber or member from Plain-

tiff's printers located outside the State of California. Plaintiff maintained no office in California through which any aspect of its magazine publishing or book club business was conducted, and Plaintiff had no employee or independent contractor in California in 1965 on a permanent or temporary basis who promoted, or in any manner was connected with or assisted, in the sales to California residents of "Popular Science" or "Outdoor Life" or any offering of either book club.

DATED: August 27, 1974

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/s/ By Paul E. Egan
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Supreme Court, U. S.
FILED
FEB 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,

Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four]

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,

Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four]

MOTION TO DISMISS OR AFFIRM

Appellee Board of Equalization of the State of California, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the instant appeal or to affirm the judgment of the Court of Appeal of the State of California.

There is no substantial federal question presented as a basis of jurisdiction inasmuch as the questions were properly decided below on the basis of previous decisions of this Court. In this regard, the decision of the District Court of Appeal of California correctly applies the principles set forth in the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nat.*

Bellas Hess v. Dept. of Revenue, 386 U.S. 753 (1967) and *Standard Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560 (1975). The case of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), which appellant contends is contrary to the opinion of the District Court of Appeal of California herein, is distinguishable from and not inconsistent with the said opinion.

Question Presented

Appellant Popular Science Publishing Company, Inc. (hereinafter "Popular Science") has not fairly stated the question presented herein. The question presented is the following: Whether Popular Science's activities in the State of California provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by Popular Science's gross receipts from its sales of books from its New York offices to California residents during the year 1965.

The Facts[1]

The factual information contained in the record on appeal herein is all set forth in a Stipulation of Facts [CT 16-19], the depositions of Adele Bercovici and Robert D. Cole and the Handbook [Ex. 1]. The Stipulation of Facts is set forth herein and the depositions are contained in the Appendix herein for the convenience of the court.

"1. On or about October 19, 1971 Popular Science Publishing Company, Inc. ('Plaintiff') paid to Defendant under protest the sum of twenty-

[1]The only year in dispute is 1965. All references will be deemed to the taxable year. All the relevant facts are contained in the Stipulation of Facts and the two depositions before the court below.

five thousand eight hundred seventy-five dollars and twenty-eight cents ($25,875.28), the amount of sales and use tax, interest and penalty allegedly due on sales of books by Plaintiff during 1965 to its book club members in California.

"2. Plaintiff was in 1965 and still is a corporation organized under the laws of the State of New York and maintains its principal place of business in New York. During 1965 Plaintiff was engaged primarily in the business of publishing and distributing through the United States and foreign mails and through news vendors the monthly magazines 'Popular Science' and 'Outdoor Life.'

"3. Plaintiff also sponsored during 1965 the Popular Science Book Club and the Outdoor Life Book Club, the memberships of which to a significant extent were composed of readers of 'Popular Science' and 'Outdoor Life.' The book clubs offered members, on a monthly basis, a choice of hard and soft cover books dealing generally with subjects similar to those treated in Plaintiff's two magazines.

"4. In addition, during 1965 Plaintiff produced and sold instructional film strips and other audio-visual educational aids which dealt with subjects appropriate to secondary school curricula ('instructional materials') exclusively through A-V Division ('A-V'). A-V was set up in 1965 to market instructional materials. A-V became a separate corporation on January 1, 1966.

"5. During 1965, A-V's instructional materials were sold to customers, primarily secondary schools, on the basis of orders received at Plain-

tiff's New York office and fulfilled from its inventories located outside the State of California. Commencing on April 16, 1965, A-V employed two salesmen in California whose duties and activities were always confined to the sales of A-V instructional materials only. The A-V salesmen lived in and traveled throughout California contacting prospective customers which were in the main schools and other educational institutions. Such customers of A-V instructional materials had no relationships of any kind with either of Plaintiff's book clubs, although some may have been subscribers to either or both of Plaintiff's magazines. The A-V salesmen did not promote or make any customer contacts on behalf of the magazines or either book club, were in no way involved in processing orders of or collecting from the magazine subscribers or book club members, and had no operational connection of any kind which in any way related to the plaintiff's magazines or book clubs. The A-V salesmen's employment related exclusively to the sale of A-V instructional materials.

"6. California subscriptions to 'Popular Science' and 'Outdoor Life' were generated either through the subscriber's own initiative or as a result of mail or media advertising emanating from Plaintiff's New York office, while newsstand sales were made be [sic] independent retail vendors supplied by a New York distributor which purchased the magazines from Plaintiff at wholesale. Book club memberships were solicited exclusively through the mail from New York, and book sales were made on the basis of orders sent by mail

to Plaintiff in New York in response to periodic mailings of brochures to members describing the current selections available.

"7. All 'Popular Science' and 'Outdoor Life' subscription and book orders were received and accepted by mail at Plaintiff's New York office and filled by mail directly to the subscriber or member from Plaintiff's printers located outside the State of California. Plaintiff maintained no office in California through which any aspect of its magazine publishing or book club business was conducted, and Plaintiff had no employee or independent contractor in California in 1965 on a permanent or temporary basis who promoted, or in any manner was connected with or assisted, in the sales to California residents of 'Popular Science' or 'Outdoor Life' or any offering of either book club."

Popular Science was a New York corporation which published and distributed nationwide two magazines, "Popular Science" and "Outdoor Life." Retail sales of these magazines were made in California. It operated two book clubs bearing the same name as the magazines, and it also distributed nationwide, and sold on a local basis certain audio-visual materials to schools and libraries. There was only one legal entity, and all the above functions were performed by employees of that single entity. Operations were broken down into departments or divisions, but each division or department manager was directly responsible to the officers of Popular Science (Deposition of Cole, pp. 6-7; Deposition of Bercovici, p. 5). The administration and payroll were done by the corporate entity, Popular

Science. All personnel were employees of Popular Science, not of any particular division (Deposition of Cole, pp. 8, 12).

Popular Science's offices were located in New York, with all divisions occupying the same address. These divisions operated separately to the extent a particular product was handled within the division. However, all work was performed for only one entity—Popular Science. The book club operated in the usual manner. The book club service could reasonably be described as a mail order operation. The audio-visual operation engaged in local retail selling in California, utilizing two salesmen who were physically present in this state. These salesmen were employees of Popular Science and were paid by Popular Science's payroll department. They received no money from the division (Deposition of Cole, p. 12).

Adele Bercovici was the general manager of the book clubs of Popular Science which was a division of the company. The other two divisions were magazines and audio-visual (Deposition of Bercovici, pp. 5-6). There was the Popular Science Book Club and the Outdoor Life Book Club. Membership in the clubs was obtained by subscriber solicitation, outside mailing lists and advertisement in the magazines published by Popular Science. The subject matter of the books was that of the respective magazines. The company sold and distributed the books to the members through the mails (Deposition of Bercovici, pp. 7-8). All of the personnel connected with the book club division

were in New York. [The book club advertisements were full page ads together with the contract application (Deposition of Bercovici, pp. 8-9).]

Robert D. Cole was vice-president and general manager of the audio-visual division of the Popular Science Publishing Company. The company published Popular Science and Outdoor Life (Deposition of Cole, pp. 5-6). The audio-visual division sold film strips, overhead transparencies and films to elementary and secondary schools (Deposition of Cole, p. 8). They dealt with ordinary school subjects (Deposition of Cole, p. 9). These products were sold in California in 1965 by two salesmen and delivered by mail thereafter (Deposition of Cole, pp. 10-11). The salesmen were employees of Popular Science Publishing Company and paid salary and commission [CT 11-12]. The salesmen went directly to the schools to make the sales (Deposition of Cole, p. 12). The orders obtained were sent to New York and were processed for mail delivery (Deposition of Cole, p. 13). The salesmen carried samples and catalogues (Deposition of Cole, p. 15).

During the year 1965, Popular Science, through its book club, sold books to Californians and said books were delivered through the mail. The purchase and use of the books by the Californians from an entity outside the state is subject to use tax, which is due from the users. (There is no dispute here that a taxable transaction had taken place. The only issue before the court is whether California had jurisdiction to require Popular Science to collect the use tax from its

California customers. *See* Rev. & Tax. Code § 6203.) The Board assessed the amount of the tax against Popular Science on the basis that it had jurisdiction to require Popular Science to collect the tax from the purchaser-users, and since Popular Science had failed to collect and remit the tax, it was liable to pay to the Board an amount equal to the tax. (*See Bank of America v. State Bd. of Equal.*, 209 Cal. App. 2d 780, 799-802 (1962).)

Summary of Argument

The California use tax collection liability here imposed with regard to Popular Science's mail order sales of books to California residents arises under California Revenue and Taxation Code section 6203 which requires, for purposes here relevant, that foreign retailers maintaining offices in California collect the use tax. This requirement does not penalize the foreign retailers; on the contrary, it merely subjects them to a tax equal to the California sales tax borne by local retailers thereby promoting competitive parity.

Under the decisions of this Court, Popular Science's California activities are not required to bear a direct relationship to the mail order sales constituting the measure of the disputed use tax collection liability. The Due Process Clause and Commerce Clause tests described by this Court do not impose such a relational requirement but rather look to whether the State has given anything for which it can ask return. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Popular Science's maintenance of the California soliciting offices satisfies this test.

The decision of this Court in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967),

does not set forth a requirement that a relationship exist between the local activity and the transaction taxed. The lack of nexus condemned in that case could be cured without imposing such a relational requirement. The *National Bellas Hess* Court invalidated the tax based upon the total absence of any local activities other than the use of common carrier and the U.S. mail. This defect is cured by requiring that the foreign retailer have additional physical presence in the taxing jurisdiction; to further require that that physical presence be interrelated with the transaction taxed would be illogical and unnecessarily restrictive of the state's taxing power.

The Court in *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941), in upholding the constitutionality of requiring mail order retailers with separate retail outlets within the taxing jurisdiction to collect use taxes, held that the absence of a relationship between a foreign retailer's local activities and the transaction taxed was immaterial.

The "dissociation" test set out in *American Oil Co. v. Neill*, 380 U.S. 451 (1964) and *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), requires that a relationship exist between the transaction taxed and the taxing jurisdiction in those instances where the legal incidence of the tax imposed falls on the foreign retailers. As the instant case involves a use tax collection requirement, the legal incidence of which falls upon the California user, the "dissociation" test is inapplicable because the relationship between the taxable transaction (the local use) and the taxing jurisdiction is self evident.

The decision of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) is inapposite to the resolution of the instant controversy. It turned upon a defect in the relationship between the foreign retailer and the transaction taxed. Residents of the taxing jurisdiction purchased items over the counter from border stores in foreign states. The Court struck down the use tax collection liability on those sales because it was uncertain whether the purchasers actually returned to the taxing jurisdiction to use the items purchased. No such defect is present in the instant case.

Finally, even if a relationship between Popular Science's local activities and the transaction taxed were required, it could be found on the facts of this case.

Popular Science personally sold merchandise in California which was similar in nature to that sold by mail order during the period here in controversy, thus putting this case on all fours with the *Sears, Roebuck* case. Moreover, the prestige of Popular Science, largely established by the Magazines, enhanced the saleability of the mail order books. Finally, both Popular Science's California activities and its mail order sales enhanced its basic corporate purpose of increasing and diffusing scientific knowledge.

ARGUMENT

I

THE USE TAX COLLECTION LIABILITY IN QUESTION WAS IMPOSED IN CONFORMANCE WITH CALIFORNIA LAW

We are here concerned with the California use tax which is complemental to the California sales tax on tangible personal property. See sections 6051, 6203 and 6401 of the Revenue and Taxation Code.[2] Section 6203 requires every "retailer engaged in business in this state and making sales of tangible personal property for storage, use or other consumption in this state" to collect use taxes from the purchaser. Section 6204 provides that the retailer is indebted to the state for any taxes which it is required to collect. The retailer becomes so indebted regardless of whether or not the use tax is collected. If the use tax is not collected, the retailer is liable for default in the performance of its duty as a collection agent for the state. *Bank of America v. State Bd. of Equal.*, 209 Cal. App. 2d 780, 793; 26 Cal. Rptr. 348, 355 (1962).

Popular Science's activities in California bring it within the coverage of section 6203 and therefore place it under a duty to collect use taxes upon the sales in question. Section 6203 expressly provides that the phrase "retailer engaged in business in this state" as used therein includes (among other descriptions not relevant to the instant controversy) "[a]ny retailer maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary,

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[2]All references to statutory sections hereinafter made shall be to the California Revenue and Taxation Code unless expressly noted otherwise.

or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." The employment by Popular Science of two salesmen within California therefore establishes it to be such a "retailer engaged in business in this state." The California District Court of Appeal, in upholding the use tax collection liability below, plainly so held. 16 Cal. 3d 637, 642; 547 P. 2d 458, 460-61.

Moreover, the imposition of a use tax collection liability measured by Popular Science's total sales to Californians best fulfills the purposes of the use tax law as well. The basic purpose of the use tax law is to provide for competitive parity by charging foreign retailers doing business in California with a use tax collection liability equivalent to the sales tax paid by competing local retailers.

A more complete description of this purpose is detailed in an article entitled *The California Use Tax*, 24 Cal. L. Rev. 175, by Roger Traynor, former Chief Justice of the California Supreme Court. It is initially observed therein that the operation of a local sales tax without a complemental use tax penalizes local retailers by permitting foreign competitors to undercut their prices by selling ex tax. The author therefore preliminarily concludes:

> "If the state sales taxation is to continue, states must find some way of equalizing the competition which now threatens their sources of revenue as it threatens their local businesses." *Id.* at 175.

This equalization is found in the complemental use tax law; however, the use tax alone could not equalize the competition because:

> "Any attempt to collect a use tax from countless individual users of commodities would involve so much supervision and expense as to vitiate the exercise of a state's jurisdiction over them. The users might have a clear responsibility for tax payment, but they might evade it by virtue of their numbers." *Id.* at 181.

Accordingly, the use tax collection liability is necessary.

This Court has recognized the validity of this purpose in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1936), wherein it said of the Washington use tax law:

> "The practical effect of a system thus conditioned is readily perceived. *One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states* who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of drain upon the revenue of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales." (Emphasis added.) *Id.* at 581.

For purposes of the instant action, Popular Science is such a foreign retailer who, absent the imposition of a use tax collection liability, would enjoy a competitive advantage over local retailers by being able to offer lower prices selling ex tax. Imposition of this liability thus comports with the spirit, as well as the letter, of the California use tax law.

II

THE CALIFORNIA ACTIVITIES OF POPULAR SCIENCE SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE

A. Popular Science's California Activities Support the Constitutional Imposition of the Challenged Use Tax Collection Liability, Regardless of Whether or Not These Activities Were Related to the Transactions Taxed

1. The Due Process Clause and Commerce Clause Tests Have Never Been Described by This Court as Requiring a Relationship Between the Local Activity and the Transaction Taxed

The Due Process Clause and the Commerce Clause are closely related insofar as similar standards have been applied by the courts to determine whether state tax laws are constitutional thereunder. *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756 (1967). These standards are incorporated into a test of nexus or minimum contact between the taxpayer and the taxing jurisdiction which is necessary to support a finding that the tax is constitutionally imposed. Although the test has been variously stated, an oft quoted definition of what constitutes nexus is set forth in *Wisconsin v. J. C. Penney Co., supra,* 311 U.S. 435, 444 (1940), wherein this Court noted:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Id.* at 444.

This definition does not engraft the requirement of a relationship between the local contact and the transaction taxed. The requisite "fiscal relation" is established by the fact that the foreign retailer has entered the state and benefited as a result. In the instant case, for example, it can be readily seen that Popular Science has secured substantial benefits from its activities within California over and above those associated with its mail order business. By virtue of the protection conferred by this State, Popular Science has been able to establish and maintain employee staffed offices throughout the state from which to solicit sales revenues for the Magazine. Further, the very opportunity of having a market of potential advertisers in California from whom to solicit business is a benefit conferred by the state insofar as its laws protect them and permit their continued existence. The net result of these activities is obviously beneficial insofar as it provides Popular Science with advertising dollars from California businesses.

Certainly the above benefits justify requiring Popular Science to collect a use tax on its mail order sales to Californians whether or not a relationship exists between the local activity and the transaction taxed. It is asking Popular Science no more than to bear a fair share of the cost of local government.

2. The National Bellas Hess Case Does Not Require a Relationship Between the Local Activity and the Transaction Taxed

This Court in *National Bellas Hess v. Department of Revenue, supra,* 386 U.S. 753 (1967) held that a use tax collection liability could not be imposed upon an out-of-state mail order retailer whose only

contacts with the taxing jurisdiction were through the use of common carriers or the U.S. mail. In so holding, the Court noted that to conclude otherwise would be to:

> ". . . repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 386 U.S. 753, 758.

It is evident from the above quoted material that a mail order seller with property within a state would be subject to taxation upon its mail order sales to the residents of that state. Popular Science's maintenance of two salesmen and their offices and equipment in this state easily qualifies it as a seller with property in California. The Court did not set out a requirement that the property owned bear any relationship to the transaction taxed. On the contrary, the overall import of the *National Bellas Hess* case is that where there is exploitation of the local market by mail order sales, any physical contacts between the retailer and the taxing jurisdiction above and beyond contact "by common carrier or the United States mail" would support the imposition of a use tax collection liability measured by the mail order sales.

Popular Science contends that under the rule of *National Bellas Hess,* a foreign retailer must have some definite link between the instate activities and the mail order sales before he can constitutionally be required to collect a use tax with regard thereto. Jurisdictional

Statement, p. 16. To construe the law in the manner urged by Popular Science would be to render the opinion in *National Bellas Hess* internally inconsistent; moreover, it would impute to the court the intent to overrule *sub silentio Nelson v. Sears, Roebuck & Co.* (1941), 312 U.S. 359, and *Nelson v. Montgomery Ward and Co.* (1941), 312 U.S. 373, despite the fact that it earlier cites both cases with apparent approval. 386 U.S. at 757.

The opinion, as so construed, would be rendered internally inconsistent because such a relational requirement would not square with the Court's recognition, earlier noted, that mere ownership of property within the taxing jurisdiction without more would support the imposition of a use tax collection liability. The opinion, as so construed, would overrule *Sears, Roebuck* and *Montgomery Ward* because these cases held, as will be discussed in more detail *infra,* that the absence of a relationship between the foreign retailer's local activities and the mail order business taxed was irrelevant.

In addition to the foregoing, it is plain upon a review of the basis of the Court's holding in the *National Bellas Hess* case that the constitutional defects it condemned could be cured without requiring that a relationship exist between the retailer's local activities and the transaction taxed. As noted above, the Court in *National Bellas Hess* considered objections raised under both the Due Process Clause and the Commerce Clause. These two sources of objection will be discussed separately in this regard.

The Due Process Clause requires that some benefit be conferred by the taxing jurisdiction for which a

return could be asked. *Wisconsin v. J. C. Penney Co., supra,* 311 U.S. 435, 444 (1940). On the facts of the *National Bellas Hess* case, it is clear that the foreign retailer benefited insofar as it had customers in the taxing jurisdiction whose continued existence was dependent upon the protection afforded them by that state. Therefore, if the Court had held due process requirements satisfied under those facts, the decision would have been logically consistent with the fairness requirements underlying concept of due process. Indeed, in the related area of *in personam* jurisdiction over foreign entities, the Court did so hold. In *McGee v. International Life Ins. Co.,* 355 U.S. 120 (1957), *in personam* jurisdiction was upheld upon the basis of a commercial exploitation of the forum state despite the absence of any physical presence therein by the foreign corporations sued. This state of affairs has prompted at least one commentator to speculate that "[i]n light of the striking similarity between jurisdiction for the purpose of taxation and jurisdiction for the purpose of exercising judicial power,[3] the court in *Bellas Hess* could easily have adopted the economic exploitation test in lieu of the archaic and artificial standard demanding physical nexus." 20 Case Western Reserve Law Review 597, 605-606, fn. 42. While the Court in *National Bellas Hess* indicated the need for a physical presence over and above this mail order economic exploitation, it would be unduly restrictive to the state's taxing power to further require that it be related to

[3]The author noted that the due process tests in the areas of taxation and *in personam* jurisdiction are very similar, citing *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir. 1956) and *International Shoe Co. v. Washington,* 326 U.S. 310, 321 (1945). 20 Case Western Reserve Law Review 597, 605-606, fn. 42.

any particular transaction. It should be enough that the foreign retailer receives some form of protection, opportunity or benefits, independent of the mail order exploitation, for which the state can ask return. As noted previously, Popular Science has so benefited from its California activities.

With regard to the Commerce Clause, the opinion of the Court in *National Bellas Hess* turned upon the administrative entanglements which the majority felt would unduly burden interstate mail order businesses if every state, municipality, school district and other political subdivisions were allowed to impose sales and use taxes at varying rates with varying administrative and record keeping requirements. 386 U.S. 753, 759-60. In keeping with the above, it is unnecessary to construe *National Bellas Hess* as requiring that a retailer's local activities be related to the taxable transaction. All that is needed to cure the defect found in that case is the requirement of a voluntary physical presence, independent of mail order sales, as a condition precedent to taxability. Thus, permitting use tax collection liabilities to be imposed with regard to mail order sales of foreign retailers who have voluntarily entered the taxing jurisdiction and established a business office will not result in the administrative entanglement condemned in *National Bellas Hess.* The number of taxing jurisdictions in which the typical mail order retailer has business offices will doubtless be small; moreover, the mail order retailer would be able to control his

susceptibility to such taxation by choosing selectively where he would maintain such offices.

It is appropriate to mention at this point that all of the bills recently introduced in Congress which relate to the imposition of a jurisdictional standard for state sales and use taxation of interstate commerce provide that a person may constitutionally be subjected to a use tax collection liability if that person owns or leases real property within the state without limitation as to whether said ownership or leasing was related to the transaction taxed.[4] This is especially noteworthy in light of the fact that most of these bills proposed general cutbacks in the power of the states to impose use tax collection liabilities upon foreign retailers under other circumstances such as those held taxable in *Scripto v. Carson*, 362 U.S. 207 (1961), thus reflecting the belief that, at least with regard to leasing or ownership of property, a foreign retailer's local activities within the taxing jurisdiction clearly subject it to tax despite the lack of any relationship to the transaction taxed. Because, as noted in *National Bellas Hess*, the Congress is vested with the power of regulation and control under the Commerce Clause (386 U.S. 753, 760), this belief upon the part of all its members introducing such bills is significant.

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[4]89th Congress: H.R. 11798, H.R. 16491; 90th Congress: H.R. 2158; 91st Congress: H.R. 2179, H.R. 3835, H.R. 4178, H.R. 7906, S. 611, S. 916, S. 2804; 92nd Congress: H.R. 1538, H.R. 4267, S. 317, S. 1210; 93d Congress: H.R. 977, H.R. 1453, S. 282, S. 1245, S. 1982, S. 2811; 94th Congress: H.R. 9, S. 28.

3. The Sears, Roebuck and Montgomery Ward Cases Hold That No Relationship Need Exist Between the Local Activity and the Transaction Taxed

In *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941), this Court upheld the imposition of an Iowa use tax collection liability measured by mail order sales of an out-of-state retailer with Iowa retail outlets. The retailer there advanced the argument that the disputed mail order sales were unrelated to the presence of its retail outlets in Iowa. The use tax collection liability was upheld despite this argument. The Court noted that Iowa, by virtue of the retailer's contacts with it, was entitled to tax the retailer's entire Iowa business. Thus, it noted:

> "Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." 312 U.S. 359, 364.

The clear implication of the court's observations in this regard is that a direct relationship between the retailer's local activities and the mail order sales constituting the measure of the use tax collection liability need not be proven. Moreover, this of necessity had to be so, for otherwise the Court could not have upheld the use tax collection liability without observing that there had been satisfactory proof of the existence of such a relationship. The mere fact of over-the-counter

sales at Sears' retail outlets in Iowa cities cannot realistically be said to constitute proof of a relationship to the catalogue mail order sales to residents of the outlying rural areas of Iowa.

In the related case of *Nelson v. Montgomery Ward, supra,* 312 U.S. 373 (1941), in passing upon the same issue, this Court found testimony relating to the absence of a relationship between the retailer's local activities and the taxable transaction was "immaterial". 312 U.S. at 375. The *Montgomery Ward* case has accordingly been cited in support of the proposition that the local activities of a foreign retailer need not have a causal relation to the sales in which the tax is levied. 81 Harvard L. Rev. 69, 215, fn. 14.

4. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy

Popular Science alludes in its Jurisdictional Statement to the "dissociation" test set forth in *American Oil Co. v. Neill, supra,* 380 U.S. 451 (1964) and *Norton Co. v. Department of Revenue, supra,* 340 U.S. 534 (1951). In relying upon these cases, Popular Science refuses to come to grips with the fact that the excise taxes there involved fell upon the foreign retailers whereas the use tax involved in the instant case falls upon the local California purchaser. This difference is crucial insofar as different standards of nexus are applied with regard to testing the validity of taxes falling on the foreign retailer.

As touched upon previously, the California use tax has its incidence upon the California purchasers who store, use or consume the products purchased from

foreign retailers. *See Bank of America v. State Bd. of Equal., supra,* 209 Cal. App. 2d 780, 793, 26 Cal. Rptr. 348 (1962). The foreign retailer is liable for his default in the performance of his duty as collection agent of this tax under California Revenue and Taxation Code section 6203. *Id.* at 799.

The significance of the distinction between a use tax collection liability, where the incidence of the tax is on the local purchaser, and liability for an excise tax imposed directly upon the out-of-state retailer itself was recognized by this Court in *Norton Co. v. Dept. of Revenue, supra,* 340 U.S. 534 (1951), where, in passing upon the constitutionality of a gross receipts tax imposed upon a nonresident retailer, it declared inapposite cases involving the collection of taxes attributable to the local buyer observing that a state imposing use taxes can more easily meet the burden of demonstrating sufficient nexus to support the tax because the impact of those taxes is on the local buyer or user. In that regard, the Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. Dilworth Co., 322 U.S. 327. Of course, *a state imposing a sales*[5] *or use tax can more easily*

[5]The reference to a "sales" tax at this point is explained by the fact that some states have sales taxes the incidence

(This footnote is continued on next page)

> *meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor.*" (Emphasis added). 340 U.S. at 537.

The distinction is justified because the local buyer or user has obvious contacts with the taxing jurisdiction, therefore a tax whose incidence falls upon such buyers or users is more easily sustainable. This is a difference in substance and not merely form. In *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), the Court noted:

> ". . . we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution, neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' Wagner v. City of Covington, 251 U.S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331.

Perhaps the best illustration of the effect of this distinction is a comparison of the *McLeod* case and *General Trading Co. v. Tax Comm'n*, 322 U.S. 335 (1944).

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of which falls upon the *consumer* rather than the vendor. See State and Local Taxation, John F. Due (1971), pp. 24-26. Illinois (at the time of the *Norton* decision) had a sales tax the incidence of which was on the vendor and therefore the court was holding inapplicable decisions involving consumer type sales taxes and use tax collection liabilities such as are present in this case.

These two cases were argued and decided on the same dates and presented virtually identical facts save and except that *McLeod* involved a sales tax upon an out-of-state retailer and *General Trading Co.* involved a use tax collection liability imposed upon an out-of-state retailer. In both cases the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by traveling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection liability was upheld. The dissents in both cases make it apparent that the majority reached different results in the two cases solely because of the nature of the tax imposed.

Similarly, *McLeod* also can be contrasted with *Scripto v. Carson*, 362 U.S. 207 (1960), where on comparable facts, the Court upheld the constitutionality of a use tax collection liability imposed upon the nonresident retailer. The facts of these two cases were recognized as indistinguishable in 81 Harv.L.Rev. 69, 216.

Just as the *Norton* case has been shown to be inapplicable to the instant controversy, so is the case of *American Oil Co. v. Neill, supra*, 380 U.S. 451 (1964). In that case, an Idaho State Tax Collector imposed an excise tax on an out-of-state motor fuel dealer. *Id.* at 454, 455. The court expressly adopted the findings of the trial judge that the incidence of the tax was on the dealer not the local user. *Id.* at 456-57.

5. The Decision of This Court in Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) Is Inapposite to the Resolution of the Instant Controversy

Popular Science makes reference to the decision of this Court in *Miller Bros. Co. v. Maryland, supra,* 347 U.S. 340 (1954). As is shown below, the *Miller Bros.* case is not germane to the question here presented because the Court's finding of insufficient nexus in that case turned upon defects not present in the instant case.

In *Miller Bros. Co. v. Maryland, supra,* 347 U.S. 340 (1954), the Court invalidated a Maryland use tax collection liability imposed with regard to the sales of merchandise by a Delaware corporation from its Delaware store to visiting Maryland customers. The merchandise purchased from the Delaware store was either handed to the customer over-the-counter or delivered to the customer's Maryland address by common carrier or the vendor's vehicle. The Court, in holding the Maryland use tax collection requirement unconstitutional, noted that it was uncertain as to whether merchandise sold over-the-counter was actually transported to Maryland prior to use. 347 U.S. 340, 344.

It is clear from the above that the Court's holding in *Miller Bros.* turned upon a defect in the relationship between the foreign retailer and the transaction taxed which is not present in the instant case. This defect was aptly described by the California Supreme Court in this case as follows:

> "The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the

> taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing Miller Bros. in Scripto v. Carson, supra, 362 U.S. 207, 212 [4 L.Ed.2d 660, 664-65], the Supreme Court declared that it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection to uphold a tax against attack under the due process clause. (American Oil Co. v. Neill, supra, 380 U.S. 451, 457 [14 L.Ed 2d 1, 6].)" 16 Cal. 3d 637, 649-50; 128 Cal. Rptr. 682, 690.

In direct contrast, Popular Science in the instant case shipped all purchases directly to its California customers inside California; hence no uncertainty or gaps intervene between the Popular Science's mail order sales and the California purchaser's subsequent use.

In addition to the foregoing, *Miller Bros.* may be distinguished from the instant case because the foreign retailer in that case did not directly exploit the market of the taxing State. Thus, the Court in *Miller Bros.* emphasized that the Delaware based foreign retailer did not engage in solicitation in Maryland, the taxing jurisdiction, "other than the incidental effects of general advertising" in Delaware and that there had been "no invasion or exploitation of the consumer market in Maryland," thereby recognizing the *incidental* nature of the solicitation of the Marylanders there involved. 347 U.S. 340, 347. Stated in another way, the Delaware store did not direct an advertising campaign specifically

against the residents of Maryland; rather, its general advertising directed to potential customers in the vicinity of the store spilled over into Maryland as well as reaching residents of Delaware. Further, the purchasers did not deal with the store from their residences but had to leave Maryland and visit the store in Delaware. This situation prompted this Court in *Scripto v. Carson, supra,* 362 U.S. 207 (1960), to characterize the facts of *Miller Bros.* as follows:

> "True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but *Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.*" (Emphasis added.) 362 U.S. 207, 212.

All of the above described factors, which led the Court in *Miller Bros.* to find that there had been no exploitation of the Maryland market, are absent in the instant case. Popular Science specifically directed its advertising campaign for the sales of books against its California subscribers. This solicitation was continuous in the form of repeated advertisements in the Magazine and mailed announcements sent throughout all periods relevant hereto. Finally, Popular Science did not wait for these California residents to come to its out-of-state stores, but enclosed with the advertisements mail order coupons which were completed and sent directly to Popular Science. It is clear that under the rationale of the *Miller Bros.* case Popular Science has exploited the California market.

For all the foregoing reasons, the *Miller Bros.* case is inapposite.[6]

B. In Any Event, Popular Science's California Activities Are Not Unrelated to the Transaction Taxed

It has been shown in the preceding section of this motion that the tests of the Due Process Clause and Commerce Clause do not require that there be a relationship between the local activities of a foreign retailer and the transaction taxed. Nevertheless, assuming for the sake of argument that such a relationship were required, it is clear that it is present in the instant case.

This is perhaps made most apparent when the instant case is compared with *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941).

Popular Science's other California contacts bear a stronger relationship to the mail order sales than those before the Court in *Sears, Roebuck*. In *Sears, Roebuck,* the existence of the retail outlets in Iowa must be said to contribute to some unknown extent to the generation of mail order sales. In the instant case, Popular Science's California based employee offices

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[6]The case of *Montgomery Ward & Co. v. Bd. of Equalization,* 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969), cert. den. 396 U.S. 1040, cited by Popular Science can be distinguished on the same grounds as *Miller Bros.* insofar as it involved a California use tax collection liability imposed with regard to over-the-counter sales of goods by an out-of-state retailer from its Reno, Nevada and Klamath Falls, Oregon stores to customers with California addresses. As the California Supreme Court below noted, the constitutional defect in the *Montgomery Ward* case "lay in the lack of uncertainty between the seller's activities and the event to be taxed, namely the use." 16 Cal. 3d 637, 649; 128 Cal. Rptr. 682, 690.

were related to the mail order sales here in controversy, by virtue of the following facts:

(1) Popular Science's California solicitation of audio-visual sales to schools and libraries from those offices provided revenues which enured to the magazine;

(2) The Magazine served as the basic vehicle through which the advertisements of books in question were communicated to Popular Science's California customers;

(3) The list of the subscribers to Popular Science and Outdoor Life provided the mailing list of California residents to whom Popular Science sent its flyers;

(4) The prestige and goodwill of the Magazines carried over to products sold under Popular Science's name.

It is thus submitted that if, indeed, a relationship between the local activities and the transactions taxed was required at all by the *Sears, Roebuck* Court, it is satisfied in the instant case as it was in that case.

Popular Science has attempted to distinguish the holding in *Sears, Roebuck* upon the ground that the foreign retailer in that case was qualified to do business within the taxing jurisdiction. Jurisdictional Statement, page 17. In that regard, Popular Science has gone outside the proven record before this Court and asserted that it was not similarly qualified to do business in California. This suggestion conflicts with the record insofar as it is stipulated that Popular Science did sell tangible personal property in California and therefore, pursuant to the presumption that things are lawfully done,[7] it must be presumed that Popular Science

[7] *McFarland v. Campbell*, 213 F.2d 855, 858 (1954).

complied with California Revenue and Taxation Code section 6066 and secured a seller's permit. It paid sales taxes. Jurisdictional Statement, page 17. Moreover, even if it were assumed that Popular Science did not seek a seller's permit, it should nevertheless be estopped to deny the lack of having qualified to do business in California in light of its stipulated admission that it did in fact do business in this state; otherwise, a business violating the law would enjoy an advantage over the law-abiding business which had secured a seller's permit.

Furthermore, the result reached in *Sears, Roebuck* should not have been otherwise if the retailer in that case had not been registered to do business within that state. Although the Court there speculated hypothetically that the lack of qualification to do business within the taxing jurisdiction might result in an inability to tax occasioned by the impotence of state power, it went on to find that the taxpayer's local activities in the taxing jurisdiction supported taxation of its mail order business. 312 U.S. 359, 364. Thus, the Court recognized that the presence or absence of qualification to do business within the taxing jurisdiction was superfluous to the conclusion it reached on the facts before it. Moreover, this Court has easily found sufficient nexus to support the imposition of a use tax collection liability against foreign corporations in other cases before it despite the fact that the corporation was not licensed to do business in the taxing state. *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *General Trading Co. v. Tax Comm'n*, 322 U.S. 335 (1944). It follows that Popular Science's arguments in this regard should be dismissed as irrelevant.

Finally, a relationship between Popular Science's California activities and the disputed mail order sales can be said to exist insofar as both activities further the basic objective of Popular Science: the increase and diffusion of scientific knowledge.

Conclusion

In light of the fairness concept underlying the Commerce Clause and Due Process Clause, it would be improper to do more than require that foreign retailers who are substantially exploiting a state's mail order market have some physical presence within that jurisdiction to become subject to a use tax collection requirement with regard to their mail order sales. To impose the further requirement that a relationship must exist between this physical presence and the mail order sales would needlessly sacrifice the states' taxing power and cripple its ability to protect its local retailers from an unfair competitive advantage thereby conferred upon foreign retailers who are free to sell ex tax.

Even were this not so, it is plain that Popular Science's California activities relate to the transaction taxed.

It is respectfully submitted that the judgment below be affirmed.

Dated: February 9, 1977.

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APPENDIX A.

California Statutes Involved.

California Revenue and Taxation Code Section 6051:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

California Revenue and Taxation Code Section 6066:

Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. Every application for a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

California Revenue and Taxation Code Section 6203:

Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

California Revenue and Taxation Code Section 6204:

The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

California Revenue and Taxation Code Section 6362:

(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

California Revenue and Taxation Code Section 6401:

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which are required to be included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,
Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Popular Science Publishing Company, Inc. ("Popular Science") opposes the motion to dismiss or affirm filed by the Board of Equalization of the State of California ("Board") for the reasons set forth in Popular Science's Jurisdictional Statement and on additional grounds set forth below.

POPULAR SCIENCE'S ACTIVITIES WITHIN THE STATE OF CALIFORNIA DO NOT PROVIDE SUFFICIENT NEXUS TO SUPPORT THE IMPOSITION OF USE TAX LIABILITY ON UNRELATED MAIL ORDER TRANSACTIONS.

This Court recently held that California could constitutionally impose use tax collection liability on a mail order seller which maintained two offices within the state even though there was no relationship between

the offices and the mail order sales which the state sought to tax. *National Geographic Society v. California State Board of Equalization,* No. 75-1868 (decided April 4, 1977).

In so holding, this Court expressly refused to endorse the "slightest presence" standard of constitutional nexus espoused by the Supreme Court of California. Slip Opinion at 5. The Court found it unnecessary to decide the constitutionality of that standard since the National Geographic Society's maintenance of two offices and solicitation by employees assigned to these offices of advertising copy in the range of one million dollars annually established "a much more substantial presence that the expression 'slightest presence' connotes." Slip Opinion at 5.

The Court thus left open the question of what threshold level of instate activity is required to provide a constitutional nexus for use tax collection liability. However, the Court did make clear that the line lies somewhere between cases in which the seller's only connection with customers in the taxing state is by common carrier or through the mail (*National Bellas Hess v. Department of Revenue,* 386 U.S. 735 (1967)) and cases such as *National Geographic,* where the seller maintained two offices within the state staffed by eight employees who solicited nearly one million dollars a year in advertising copy. Indeed, the Court reaffirmed *Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954), which held that the taxing state could not constitutionally impose use tax collection liability even where the out-of-state seller delivered goods by truck into the taxing state, advertised in media which reached residents of the taxing state, and supplemented those advertisements with flyers mailed directly to customers in the taxing state. Slip Opinion at 7-8.

It is respectfully submitted that the activities of Popular Science in California were so insubstantial and totally unrelated to the sales which the state is seeking to tax that dismissing or affirming the instant appeal would in effect endorse and confirm the slightest presence test.

The Board implicitly recognized the weakness of the slightest presence test by going outside of the record to paint a distorted picture of the nature and extent of Popular Science's activities within the state.

As set forth more fully in the Jurisdictional Statement, the only basis upon which the state could assert liability for use tax collection on Popular Science was the activity of two travelling salesmen who solicited sales of unrelated products. Throughout its Motion to Dismiss or Affirm, the Board erroneously characterized the presence of the salesmen as "maintaining offices within California" apparently in an effort to buttress its claim that Popular Science received benefits from the state sufficient to justify the imposition of use tax liability. (See, *e.g.,* Motion to Dismiss or Affirm, pp. 8, 11-12, 15, 16).[1]

In one passage, which can only charitably be described as misleading, the Board asserts that Popular Science "has been able to establish and maintain employee staffed offices throughout the state from which

[1]The Board argues that Popular Science's activities in California bring it within the coverage of Section 6203(a) of the Revenue and Taxation Code. Section 6203(a) provides that a "retailer engaged in business in this state" includes "any retailer maintaining, occupying or permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." As noted above, the stipulated facts in this case do not support the Board's position.

to solicit sales revenues for the Magazine." Motion to Dismiss or Affirm, page 15. In fact, that assertion is not and cannot be supported by the record in this case.

Indeed, it is directly contradicted by the facts set out in the Board's own Motion to Dismiss or Affirm under the caption "The Facts" at pages 2-5.

The stipulated facts on which this case was tried do not show that Popular Science during the period in question maintained an office or held any tangible or real property in California during the period in question. Nor did its two salesmen solicit advertising for the Magazine or promote mail order sales for any products sought to be taxed in this case. Their sole function was to solicit orders for audiovisual products completely unrelated to the mail order sales of books which the state seeks to tax.

The Board attempts to bolster its nexus argument by contending that Popular Science has directly exploited the California market by means of mail order advertisements in the magazine and announcements mailed to California subscribers. These mailings and all other contact with customers were, as the Board conceded in its Motion to Dismiss or Affirm and the Stipulation of Facts on which the case was tried, made solely through the instrumentalities of interstate commerce from outside the state. Thus, these contacts cannot be described as instate activity. Moreover, these advertisements were directed at subscribers, wherever

located, and only incidentally reached customers having addresses in California.

Furthermore, while the Court held in *National Geographic* that the absence of a relationship between the activity of the seller sought to be taxed and the seller's activity within the state does not bar the imposition of use tax liability, the Court did not rule out "dissociation" as a factor in the qualitative and quantitative examination of local activity to determine the existence of a taxable nexus.

It is respectfully urged that where, as in the instant case, an out-of-state seller's instate activities are both insubstantial and completely unrelated to the transactions sought to be taxed, no taxable nexus exists. As applied here, California's "slightest presence" test would permit the state to impose a use tax on unrelated sales even though Popular Science did not benefit from the panoply of municipal services provided to the Society's offices in *National Geographic*.

It is urged that a decision by the Court to decline jurisdiction, or alternatively, to affirm based on a finding of taxable nexus in this case, would extend *National Geographic* to approve the slightest presence test *sub silentio*. The perpetuation of such a rule would create unreasonable and stifling burdens on interstate commerce. With such a rule, business could not engage in normal interstate travel and communications into and with foreign states without exposing themselves to the possibility of penalties, such as those imposed in the

instant case, in the form of retroactive assessments of use tax liability on unrelated out-of-state transactions involving persons using addresses in the foreign state. The Board has not shown any benefit to the State that will balance the detrimental chilling effect of such a rule.

Conclusion.

It is difficult to imagine a case posing in bolder relief the dangers of the "slightest presence" test put forward by the Supreme Court of California. This Court should strike down that test—a step found unnecessary in *National Geographic, supra.*

Therefore, it is respectfully urged that the Court note probable jurisdiction to define clearly the requirements for a showing of taxable nexus in a case involving minimal instate activity, or in the alternative, that the decision below be summarily reversed.

Respectfully submitted,

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